BOOK REVIEWS

M. Phelan, G. Edson, and K. P. Mayfield (eds.), *The Law of Cultural Property and Natural Heritage: Protection, Transfer, and Access*. Kalos Kapp Press, Evanston, Ill. 1998. US$95.00 ISBN 0-9643080-1-0. Reviewed by Patrick J. O'Keefe*

This is a frustrating book. Parts of it are excellent; others of less value. But overall there is the question of purpose. The preface states: "The purpose of the treatise not only is to inform the reader of legislation and programs that are in place to conserve cultural resources but also to alert the reader of the limitations of such statutes and procedures and the urgent need for cooperation among countries to assure that cultural treasures will be preserved for present and future generations." By and large, the first objective is attained, but the second falls short. Moreover, the title refers to natural heritage, which receives little attention in the text.

What does the work consist of? The title of the first five chapters are "The Concept of a Cultural Heritage of Humanity"; "International Legal Protection of the Underwater Cultural Heritage"; "Protection of Cultural Property from the Effects of War"; "Procedures for the Protection and Preservation of Cultural Property"; and "The Fight against the Illicit Traffic of Cultural Property: The Role of Museum Professionals." Outstanding among these is the third, by Hays Parks, Special Assistant to the Judge Advocate General of the Army for Law of War Matters, U.S.A. It is an excellent summary of the development of rules concerning the treatment of cultural property in time of war, in particular since the Lieber Code of 1863.

There follow sixteen chapters describing the legal situation of cultural heritage in the United States of America, Botswana, Canada, the People's Republic of China, the Republic of China, Croatia, France, Greece, Italy, Luxembourg, New Zealand, Poland, Spain, Sweden, Turkey, and the United Kingdom. No indication is given of how these examples were selected. There is a heavy imbalance in favour of Europe and North America. A notable omission is Japan, and there are no examples from South America or the Middle East—both areas of great importance, particularly for the archaeological heritage.

It is on the archaeological heritage and the market in heritage that most of the contributors concentrate. Only a few go on to include historic preservation and other aspects of cultural heritage law in any detail. A treatment of copyright appears in a number of chapters, but usually in a perfunctory way. The editors specifically justify its inclusion.

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> Copyright laws protect intellectual property, much of which becomes cultural property. Artistic works are protected in perpetuity by an artist's moral right, which is part of the copyright law in most countries. Thus, summaries of copyright laws in a few of the countries are assembled to give the reader a rudimentary concept of international copyright protection of cultural property.

However, on reading the contributions, one is struck by the dichotomy between the general section on cultural heritage protection and that on copyright—maybe because it is not intellectual property that becomes cultural heritage, but the subject of intellectual property. Copyright does not protect cultural property. It may assist and encourage the creation of what may become cultural heritage. Of the artist's moral right, only the right of integrity could be said to offer protection, while that of withdrawal may indeed work the other way.

As noted above, the quality of the contributions varies. Some, such as those for France and Luxembourg, are little more than descriptions of the law. Others, such as those on the People's Republic of China, Italy, New Zealand, and Poland, are more interesting, precisely because they attempt to assess how the legislation is working in practice and provide examples of situations faced. Analysis provides the intellectual content so necessary for understanding of the legislation. A straight description is no better than providing a copy of the Act.

The Law of Cultural Property and Natural Heritage would be a useful starting point for one who knows nothing about the topic. For those knowledgeable in the field, the nuggets of useful material that do exist must be sought among a mass of very general information.

Françoise Chatelain, Christian Pattyn, and Jean Chatelain, *Oeuvres d'art et objets de collection en droit français [Works of Art and Art Objects of Collections in French Law].* 3d ed. Paris: Berger-Levrault 1997. 236 pp. ISBN 2-7013-1203-5 FFr. 315.00. Reviewd by Marie Cornu.*

The first edition of this classical study[1] was written by Jean Chatelain, the late director of Musées de France and author of the Chatelain Report to the European Communities,[2] an important annotated document.[3] Françoise Chatelain, Jean Chatelain's daughter and an attorney-at-law in Paris, and Christian Pattyn, director of *Patrimoine,* prepared the third edition.

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The new edition gives a comprehensive survey of all French legal provisions concerning works of art and objects in art collections. This is not easily done. In order to achieve this, the authors' exhaustive documentation required them to know all about the various regulations of French public and private law. The third edition summarizes the substance of the previous editions and updates the legal situation by reference to new legislation and court decisions. Even several codifications have to be taken into account, such as the Code de la propriété intellectuelle and the Code pénal, which revised the provisions designed to protect public collections (article 322-2). In addition to this, important provisions on cultural property had to be treated, especially the legislation of 31 December 1992 on the export of works of art;[4] the law of 4 July 1990[5] modifying the law of 23 July 1987 on the development of donations and the creation of a new form of foundation, the enterprise foundation; and the law of 3 August 1995[6] implementing the European Directive on the restitution of cultural objects unlawfully removed from the territory of a member state.[7]

French law distinguished between different types of cultural property and rules of protection. There have been developments in this area as well. The provisions on objects that are publicly owned are especially important and useful.[8] The authors point out the territorial limits of this qualification and, in general, of the theory of public property. The classification of objects as *monuments historiques*, on the other hand, applies to movable objects irrespective of whether they are owned privately or publicly, although everybody knows that the majority of classified objects are owned by public institutions. Despite all changes, the law of 31 December 1913 is still the fundamental basis in France for the protection of works and objects of art.[9]

In French law there are two different procedures for classifying cultural objects, one for major rules of protection and one for registration in inventories. The book describes the effects of these rules on the circulation and conservation of art objects. A separate chapter is devoted to the rules on excavations because of the special treatment and development of this activity and because of the complexity of the institutions involved. In particular, some important public and private organisations and their functions are described, such as the Conseil National de la recherche archéologique, the Association Française pour le développement de archéologie national, and regional bodies of archaeology. The field of underwater archaeology (in addition to terrestrial archaeology) is also discussed, as well as the administrative treatment of archaeological objects.

The law on circulation of cultural objects is based on the one hand on keeping important material testimonies of the past within the state of origin and on the other hand on the prevention of any unlawful removal. The law of 31 December 1992[10] has abolished the law of 23 June 1941 because the single European market within the European Union made it necessary to revise the sources of the past.

The final chapter of the first part of the book is devoted to fiscal problems, the incentives to donors and to the provisions added in 1968 to the Code Général des Impôts. These provisions have contributed considerably to the expansion of public collections by allowing taxes to be paid through a donation of artwork(s) to public institutions.

The second part of the book analyses the rules governing art trade, because art objects are also economic objects. The art trade has some peculiar features, and the authors describe their principal aspects. In most art transactions there is considerable uncertainty as to the authenticity of the objects. Important are the warranties in favour of the purchasers and the possibility of getting out of the contract because of a mistake or representation. Also, the position of certain intermediate persons are discussed, that of the experts and the responsibility with respect to the expert opinions concerning art objects.

Sales of art objects at public auction are governed to a large extent by the general rules of the law of sales, but they are also subject to special rules of procedure and to the special role of official auctioneers (*commissaires priseurs*). Their status is going to be changed in the near future. Because of European Community Law, the monopoly of the *commissaires priseurs* has to be terminated and access given to auction houses established in other member states of the EU. When the law of public art auctions is discussed, the *droit de suite* under the law of 20 May 1920[11] has to be dealt with also. This *droit de suite* favours all authors of graphic and plastic art and is at present under heavy discussion in the world of art trade. In a separate chapter the authors analyse problems of copyright and of different preferences of a moral and a pecuniary nature accorded to the author because of his creation of a work of art.

Finally the crucial questions of illegal art trade and theft of art objects introduce certain perspectives of community and international law. The authors deal with the most important international instrument in these fields. Some of them provide for the return and restitution of stolen or illegal removed art objects, especially the Unidroit Convention of 24 June 1995.[12]

The book on French art law is written by excellent experts experienced in law, practice, and professional activities. The authors are well able to trace the rapid and complicated evolution of French, community, and international law on cultural property from its historical background.

NOTES

1. Jean Chatelain, *Oeuvres d'art et objets de collection en droit français* (Paris 1982).

2. Jean Chatelain, *Means of Combating the Theft of and Illegal Traffic in Works of Art in the Nine Countries of the EEC*, EEC Doc. XII/757/76. German translation as: Jean Chatelain, *Mittel zur Bekämp-*

fung des Diebstahls von Kunstwerken und ihres unerlaubten Handels im Europa der Neun (Baden-Baden, Nomos 1978).

3. Jean Chatelain, *Droit et administration des musées* (Paris: La documentation française/ Ecole du Louvre 1993). The first edition of this book was published in 1984 and had 122 pages. Ten years later, the third edition comprises 675 pages.

4. Loi no. 92-1477 du 31 décembre 1992 relative aux produits soumis à certaines restrictions de circulation et à la complémentarité entre les services de police, de gendarmerie, et de douane.

5. Loi no. 90-559 du 4 juillet 1990 créant des fondations d'entreprise.

6. Loi no. 95-877 du 3 août 1995 portant transposition de la directive 93/7 du 15 mars 1993 du Conseil des Communautés européennes relative à la restitution des biens culturels ayant quitté illicitement le territoire d'un Etat membre.

7. Directive 93/7/EEC of 15 March 1993, see 6 *International Journal of Cultural Property* 387 (1997).

8. Cf. pp. 20 *et seq.* of the revised book.

9. Loi du 13 décembre 1913 sur les monuments historiques. As to changes up to 1986, cf. Chatelain, *supra* note 3, at 265.

10. *Supra* note 4.

11. Loi du 20 mai 1920; Art.L. 122-8 loi no. 92-597 du 1er juillet 1992 relative au Code de la propriété intellectuelle.

12. Convention d'Unidroit du 24 juin 1995 sur les biens culturels volés ou illicitement exportés; see 5 *International Journal of Cultural Property* 155 (1996).

Anna Tyczyńska and Krystyna Znojewska (eds.), *Straty Wojenne, Malarstwo Polskie: Obrazy olejne, pastele, akwarele utracone w latach 1939–1945 w granicach Polski po 1945 [Wartime Losses, Polish Painting: Oil Paintings, Pastels, Watercolours Lost between 1939–1945 within post-1945 Borders of Poland] (Polish Cultural Heritage: Series A. Losses of Polish Culture).* Pp. 320. Bogucki Wydawnictwo Naukowe; Office of the Government Commissioner for Polish Cultural Heritage Abroad, Poznań 1998. ISBN 83-86001-82-8. Reviewed by Mirosław Olbryś*

Although over half a century has passed since the end of World War II, problems connected with the general elimination of the effects of war on cultural objects, libraries, and archives are profiting by present-day interest[1] This topic concerns al-

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most all European countries, where smuggling and illegal trade in stolen artworks were rampant even in the absence of direct military operations. Political transformations in Central Europe at the end of the 1980s led to the disclosure of archives related to wartime theft and looting of art objects after the war. Many historical relics once believed to have been destroyed have been recovered. It is now possible to have an open discussion about the thousands of works of art currently in Russia that had been taken away by the Red Army as booty from Germany after the end of World War II. The outcome of wartime losses in the area of culture has been especially tragic for Poland.

Mass removal of art objects to the Third Reich also greatly diminished the Polish people's cultural heritage resources.[2] Although other western European countries suffered under German assault, the Nazi occupation of Poland was a unique combination of organized theft of the nation's cultural treasures and the extermination of its people. The scale of damage and plunder in central and eastern Europe was far greater than that in western Europe. In addition to suffering direct losses as a result of bombing and fires, museums and libraries were the targets of carefully planned and precisely executed plunder. The German army, police, and administrative organs participated in the systematic robbery of public and private collections.[3] It is estimated that 74 palaces, 96 mansions, 102 libraries, 28 museums, and 3 painting galleries were plundered in 1939 alone. Looting and plunder were not the sole territory of the German occupiers; the Soviet army too helped itself to Poland's rich cultural heritage.

Since the 1980s, international dialogues have been held concerning the return of works of art stolen during or just after the war, and not found or not returned so far. Bilateral talks with Germany and Russia have been conducted for the Polish side by the Government Commissioner for the Polish Cultural Heritage Abroad since 1991. The responsibility of this newly established office is broadly defined and aims at the definitive elimination of the effects of the last war in the sphere of culture.[4] The Government Commissioner cooperates closely with the Ministry of Foreign Affairs and the Ministry of Culture and Art. He initiates and coordinates actions in the protection of Polish heritage abroad and implements intergovernmental agreements in this sphere. The Office of the Government Commissioner keeps a record of movable and immovable cultural properties related to Poland and now found abroad as a result of wartime looting, changes in national status of some territories, and illegal removal. Data on the circumstances under which movable cultural property losses occurred are collected, ideas for the properties' restitution are considered, and inquiries and restitution activities are organized.

The Office of the Government Commissioner conducts research and produces documentary and editorial works; it registers wartime losses comprising library collections in Polish territory after 1945.[5] The register of movable cultural

properties losses is being prepared in cooperation with Polish museums. Losses of works of art are also submitted by individuals. Over 50,000 entries figure already in an electronic database called "Collection of art objects damaged, taken abroad, or lost." Regrettably, only 10 percent of the registered items have photographic documentation. Intergovernmental agreements have been negotiated and signed with Russia (1994), Belarus (1995), and the Ukraine (1996) concerning cooperation in the protection of cultural heritage.

The editorial activity of the Office includes the publication of two series, *Wspólne Dziedzictwo* (Common Heritage) and *Straty Kultury Polskiej* (Losses of Polish Culture). The most important catalogs of wartime losses in archaeology, Polish and foreign painting, and numismatics are in preparation. *Wartime Losses: Polish Painting . . .*, prepared by Anna Tyczyńska and Krystyna Zdrojewska, both from the National Museum in Warsaw, inaugurates the *Losses of Polish Culture* catalog series. The volume is in Polish and English, facilitating international circulation.

The catalog comprises information on 442 watercolours, oils, and pastels by Polish artists from the seventeenth to the twentieth centuries. This number represents just under 10 percent of the 4,600 lost works by Polish painters so far registered in the database. The publication presents only those paintings that could be identified on the basis of preserved and available photographs and therefore does not include many works of art known only from more or less detailed descriptions. Of paramount importance to the authors in their decision on what to include were the quality of information and the possibility of obtaining photographs of the works in question. The works are numbered consecutively in alphabetical order by the painter's name. Every note contains detailed data on the painting, its author, the owner as of September 1939, references, and a black-and-white reproduction. Listed at the end of the book are paintings by unknown artists (Nos. 424–432) and miniatures (Nos. 433–442). Works by the same author were listed in chronological order when possible.

Losses listed in the catalog include at least one canvas (though in many cases more) of the most eminent Polish painters, the standard-bearers of the periods they were active in, such as Marcello Bacciarelli, Józef Brandt, Józef Chełmoński, Jan Matejko, and Stanisław Wyspiański. Most of the paintings included in the catalog belonged to collections of the National Museum in Warsaw, the Silesian Museum in Katowice, the Society of Friends of Science in Poznań, the Society for the Encouragement of Fine Arts (Zachęta) in Warsaw, and the State Art Collection in the Wawel Castle in Cracow. The Branicki and the Habsburg (of Żywiec) families are among the private owners. The catalog ends with an index of owners and a list of the photographers and photo archives that served as the source of the catalog illustrations. The volume is a very fine hardcover edition on coated paper.

Unfortunately for Poland, the political events that unfolded after World War II caused the legal and international instruments used to eliminate the effects of

war in the field of culture to be applied only in a very small degree. It was only due to the democratic transformations at the end of the 1980s that it was once again possible to address this still unsolved problem. The more than 516,000 art objects lost by Poland during World War II that had already been cataloged by the middle of the 1950s testify to the great importance of the issue.

The present catalog is the first publication of this type to appear in Poland since 1953. Although it documents only a small part of the actual losses of objects of Polish culture, it is undoubtedly of considerable scientific value, as it provides not only evidence of the huge scale of damage, but also a visual record of the scope and nature of the losses. It may contribute to identification and retrieval of lost objects.[6] Its publication is an important Polish voice in the current discussion on the problem of wartime losses, placed in a European context, with emphasis on German-Russian relations and the issue of the legality of purchases by the most renowned museums (e.g., in Great Britain, France, and Austria) of works of art originating from wartime theft.

Up to now, none of the paintings included in the catalog has been the subject of a restitution request. Submitting such a document requires indicating the place where a lost object is deposited. Germany has received from the Government Commissioner a list of works of art justifiably believed to be stored in German territory; on it appear some of the paintings by Polish artists taken from the museum in Poznań that are included in the catalog. Perhaps this is a sign that in the future the Polish people's cultural heritage losses will be diminished or compensated, at least to some degree. However, even if a full restitution will never be possible, Poland nonetheless lays claim to the return of its cultural property. Poland's cultural resources, obtained by dint of pillage and extermination of its people, can not ever form a part of another country's cultural heritage.

NOTES

1. The first catalog of the wartime losses suffered by Poland were published shortly after the conclusion of the war; see Władysław Tomkiewicz, *Catalogue of Works Removed from Poland by German Occupants in the Years 1939–1945: Foreign Painting* (Warsaw 1949); *id.*, *Catalogue of Works Removed from Poland by German Occupants in the Years 1939–1945: Polish Painting* (Warsaw 1951); W. Tomkiewicz, K. Sroczyńska, S.E. Nahlik (eds.), *Straty wojenne zbiorów polskich w dziedzinie rzemiosła artystycznego [Wartime Losses of Polish Collections in the Field of Craftsmanship]*, vols. 1–2 (Warsaw 1953); Dariusz Kaczmarzyk, *Straty wojenne Polski w diedzinie rzeźby [Poland's Wartime Losses in the Field of Sculpture]* (Warsaw 1958).

2. The people's cultural heritage, as defined by Professor Jan Pruszyński (Polish Academy of Science), is their cultural possessions, acquired legally and in their lawful possession for a relatively long time; cf. Jan Pruszyński, Kontredans dyplomacji, *Rzeczpospolita*, December 19–20, 1998, at 17.

3. The thefts were legalized in a decree of December 16, 1939, signed by Governor General Hans Frank, on general confiscation of works of art in German-occupied Poland. A choice of over 5,000 objects among all assembled works of art ranging from painting and sculpture to numismatic collections was published in a German catalog for "securing" works of art in German-occupied Poland; see *Sichergestellte Kunstwerke in General Gouvernement* (Wilhelm Gottlieb Verlag, Wrocław 1940 or 1941, 4 vols).

4. On the activities carried out by the Polish state immediately after World War II, see Wojciech Kowalski, *Liquidation of the Effects of World War II in the Area of Culture* 63-88 (INTER-GRAF Warsaw 1994).

5. The giant scale of Polish libraries' losses was presented recently in a report by Barbara Bieńkowska, *Losses of Polish Libraries during World War II* (Warsaw 1994).

6. The book was sent out to museums and auction houses in Poland and abroad as well as to Polish diplomatic agencies all over the world.

Gerte Reichelt (ed.), *Neues Recht zum Schutz von Kulturgut: Internationaler Kulturgüterschutz, EG-Richtlinien, UNIDROIT-Konvention, und Folgerecht [New Law on the Protection of Cultural Property: International Protection of Cultural Property, EC Directives, UNIDROIT Convention, and droit de suite]* (*Schriftenreihe des Ludwig Boltzmann Instituts für Europarecht*, Band 1). Pp. VIII + 174. Manz, Wien 1997. AS 520.00. ISBN 3-214-06981-0. Reviewed by Marc Weber.*

The Ludwig Boltzmann Institute for European Law in Vienna was founded in 1996 and since then has been directed by Gerte Reichelt, professor of law at the University of Vienna. In spring 1997, a symposium was held titled "New Law on the International Protection of Cultural Objects."

Erik Jayme, professor of civil law, private international law, and comparative law at the University of Heidelberg, explained an important relationship in "Legal Terms and History of Art." A tendency has arisen lately, in international law as well as in national legal systems, to develop a set of special rules concerning the transfer, restitution, and protection of art objects. These legal rules are chosen from categories and classifications known in the history of art or archaeology. This technique has created difficulties in interpreting these "legal" terms, as evidenced by many court decisions. In 1929, for example, the German Reichsgericht[1] approved a claim of the owner of some Chinese vases, which the owner sold for 390 Reichsmarks and were later auctioned for a price of 200,000 Reichsmarks. After the purchase at auction, the original owner became aware of the fact that the art-

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works dated not from the beginning of the nineteenth century, but from the Ming dynasty (1380–1644). The court affirmed an essential error of the original owner. The decision was based on the special value of antiquity of the objects.

Another problem is the "nationality" of an artwork, that is, the quality of an art object as being part of any national heritage. In this field of characterisation it is obvious how the law depends on the history of art. In the well-known American case *Jeanneret v. Vichey*,[2] the court of appeals came to the conclusion that the Italian export prohibition order could not be enforced abroad because the painting did not have such a strong relationship to Italy as a Madonna by Raphael or Giovanni Bellini, for example. In this case, law and art history were brought together to try to determine the nationality of a cultural object. In the author's opinion, the nationality of the artwork depends legally on its reception in a particular country (so-called *Rezeptionstheorie*[3]). Hence, the author advocates an approach based on a dialogue between law and history of art, between lawyers and art historians.

Kurt Siehr, professor of private law, comparative law, and private international law at the University of Zürich, reported on "The EEC Directive of 1993 on the Return of Cultural Objects and Art Trade." The Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a member state[4] obliges all member states to implement the directive and to enact rules on such a return. According to the directive, every state may ask for the return of unlawfully removed cultural objects, and even a bona fide purchaser or holder of the object will not be protected against such a claim. The bona fide holder of the object may only get fair compensation.[5]

The art trade is also affected by the directive and by its national implementations. The art dealer will be held liable for damages or, at least, has to refund the purchase price of a cultural object sold by him. This is the consequence of the fact that the buyer must return an object that was unlawfully removed from the territory of a member state of the convention. The seller has to warrant quiet possession if such a responsibility is not validly excluded in the contract.

Friedrich Krinzinger, professor at the Austrian Archaeological Institute of the University of Vienna, contributed a paper titled "The Protection of Archaeological Cultural Property." Illicit excavations of archaeological sites have significantly increased and destroy invaluable information about the context of these objects. The historic and geographic context of archaeological discoveries is the most important source and the only authentic testimony for historical identification and context reconstruction. The knowledge of methods of placement of antiques, their exact geographic location, and possible traces of other hidden sites are crucial for any scientific research and are at risk of being lost due to uncontrolled illicit excavations.

The statutes of ICOM (International Council of Museums, Paris) have already introduced a code of ethics aimed at promoting a worldwide battle against

illicit traffic of cultural property. The code of ethics is regarded as mandatory for any private collector and those working in public collections.

The Berlin Declaration, issued at the Thirteenth International Congress for Classical Archaeology, held in 1988,[6] clearly points out the importance of excavations being executed only under scientific surveillance. Even many museum experts still hold the mistaken view that the artistic uniqueness of an object is of a higher value than its historic context. Some countries promote claims for the restitution of cultural property for merely political reasons.

As the author emphasizes, source countries and their legal situation alone are not to blame for the lack of control of illicit exports of antiques. It is also the legal and moral duty of the importing countries, the museums, and the art dealers to reduce the incentives for people active in clandestine excavations. This can be done most effectively by prohibiting commercial traffic in or acquisition of objects originating from such excavations. Thus, it is necessary to enhance solidarity and cooperation between countries of origin, archaeological teams, international art museums, and art dealers. Only common efforts can lead to the reduction of the irresponsible practice of illicit excavation.

Gerte Reichelt, a professor at the Institute of European Law of the University of Vienna, spoke on "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Goods of 1995,"[7] prepared under the auspices of the Institute for the Unification and Harmonisation of Private Law (UNIDROIT, Rome). The UNIDROIT Convention entitles private persons and state officials to recover cultural goods that have been stolen and/or dislocated illegally from their country of origin. Cultural goods include outstanding artifacts in the fields of fine art, archaeology, history, literature, and science and are specified in the list of categories enumerated in the annex of the Convention. The Convention refers also explicitly to those cultural goods which are protected under the UNESCO Convention of 1970. The right to bring a claim under the UNIDROIT Convention requires an international aspect, and the dislocated cultural goods must have been transfered from one country to another country. If this is the case, public or private owners are entitled to ask for the restitution of the cultural goods from any new possessor who acquired possession meanwhile. The Convention grants the right of return even if the present *lex fori* provides for a doctrine of bona fide purchase: the bona fide purchaser has to return the object (though he may ask for compensation if he can prove due diligence when acquiring the object).[8] Despite its weak points, we should welcome the UNIDROIT Convention. On January 1, 2000, the UNIDROIT Convention went into effect in Bolivia, Brazil, China, Ecuador, Hungary, Lithuania, Paraguay, Peru, and Rumania.[9]

The second report on the UNIDROIT Convention was by Spyridon Vrellis, professor of private international law at the University of Athens. He concentrated on the significance of the *lex originis*. In the Convention, the terms "origo" and "na-

tional" (cultural good) are neither used nor explicitly mentioned. The *lex originis* may be defined as the law of the contracting state from whose territory the cultural object has been exported. In addition, the definition of the state of origin is based on local elements, such as the place of excavation (art. 3, para. 2), the fact that the cultural object forms an integral part of a monument or is held by a public collection (art. 3, para. 4), the fact that the cultural object has been created by a member of a tribal or indigenous community for traditional or ritual used by that community (art. 7, para. 2), and so on. A return claim can be entered in the courts of the contracting state of origin (e.g., as *forum delicti*) (art. 8, para. 1), which are likely to apply their own law (i.e., the *lex originis*). In cases involving illegally exported cultural objects, the contracting states are bound to recognize foreign mandatory rules and the public law of the requesting state of origin concerning the protection of cultural objects (art. 5) as well as to take into consideration whether an export certificate is required under the law of this state (art. 6, para. 2). In the cases of stolen objects, however, the importance of the *lex originis* is of less importance. However, the invocation of this law has in particular a negative effect in the case of art. 3, para. 4.

Michel Walter, attorney-at-law in Vienna and a specialist in copyright law, contributed a paper titled "The Resale Right and its Harmonization in Europe." He presents the legislation concerning the resale right (*droit de suite*) in the European Community member states[10] and a first proposal for a Resale Right Directive of 1996.[11] The *droit de suite* was created in France by an act of 1920,[12] which in the beginning was restricted to sales at public auctions. The distribution right of the author expires with regard to copies of the work once they are sold with the consent of the author (first sale doctrine). Since the author cannot control the resale of such copies by the acquirer, the author is given a resale right granting a claim to an equitable participation in the resale price if originals of artistic works or manuscripts are resold. The main purpose of the *droit de suite* is to grant to the author a participation in the value added (*plus-value, Mehrwert*) on the market after the first sale, which, as a rule, takes place at a lower price. Under art. 14 of the Berne Convention,[13] the *droit de suite* may not be assigned *inter vivos*. The main objects of the *droit de suite* are artistic works, but some statutes also include manuscripts of literary works and music. Whereas works of applied arts (*angewandte Kunst*) and buildings in principle should not participate in the resale right, works published in limited series such as etchings, wood engravings, and lithographs should be regarded as originals if sold on the art market. Some statutes have restricted the granting of resale right to sales in public auctions.[14] The author disagrees with such restrictions, since they violate the principle of equality of the different European constitutions. In Walter's opinion, the *droit de suite* should also include sales through art dealers, if not private transactions[15] as well. In some instances—for example, after the author's death—the resale right may be dedicated to social or cultural entities.

In the Phil Collins decision of 1993,[16] the European Court of Justice held that the nondiscrimination rule of art. 6 EC Treaty[17] applies also directly in copyright (*Urheberrecht*) and neighbouring rights (*Leistungsschutzrecht*). That means that member states of the EC or the European Economic Area (EEA) have a legitimate claim to the *droit de suite* even if their national law (*Heimatrecht*) does not recognize the *droit de suite* and therefore there is no guarantee of reciprocity according to art. 14, para. 2, of the Berne Convention.[18]

The proposal for the Resale Right Directive of 1996[19] harmonizes the different legislation in EC member states. The author has only a few propositions to make.[20]

The second report on the resale right, "The Droit de Suite in International Copyright Law: The Beuys' Case" is by Jörg Schneider-Brodtmann, attorney-at-law, Stuttgart. He refers to a famous case judged by German courts a few years ago, the so-called Beuys Case:[21] in London, in the summer of 1989, Christie's auctioned three of Joseph Beuys's works for a price of about DM 1.4 million. The works had been delivered from Germany to London by their German owner for the sole purpose of being auctioned. The German copyright collecting society Bild-Kunst filed an action under section 26 of the German Copyright Act 1965[22] in German courts against the seller, Professor Graubner of Düsseldorf, on behalf of the artist's widow, Eva Beuys, for a *droit de suite* royalty of 5 percent of the price obtained. The decisive question to be answered was whether the resale right of the German Copyright Act 1965 was applicable to the sale of a German artist's artworks at auction in London, particularly when their German owner had brought those objects to the United Kingdom only for this particular purpose.[23] For this particular reason, the court of first instance (*Landgericht*) affirmed the claim and granted the action.[24] The court of second instance (*Oberlandesgericht*) granted Graubner's appeal and reversed the first finding.[25] The decision was based on the so-called principle of territoriality, which imposes a compelling territorial restriction upon copyright. The Bundesgerichtshof denied the claim of the plaintiff (Eva B.) and reversed the action relying on the same considerations of the Oberlandesgericht.[26] The author points out that according to article 14 of the Berne Convention,[27] to the *droit de suite*, and to the general rules of private international law, there would have been reasonable arguments for applying the German *droit de suite* and granting Joseph Beuys's widow a share in the proceeds of the sale. Going further, the author takes the experiences gained from the Beuys case to challenge the restrictions of the principle of territoriality in international copyright law and to call for a real international protection of authors and artists by universally recognizing the existence of their rights acquired under the *lex originis* of the work or the *lex patriae* of its author.

Wilfried Fiedler, professor of public law and public international law at the University of Saarbrücken, gave a report called "Between Spoils of War and In-

ternational Responsibility: Cultural Property in the International Law of the Present, a Plea for a Current Practice of the International Law." The author starts with two events that occured in 1996 and 1997. One of these occurrences concerned the restitution of cultural property between Germany and Russia.[28] This agreement is a legal treaty that forms a sound basis for a deeper political understanding between the two countries in the future. Certainly one of the main problems of restitution is the factor of time. In cases of restitution of cultural property, even a period of fifty years may have almost no legal impact, as shown in the case of German property that had been transfered from Berlin to the Ukrainian capital, Kiev, and had remained there for the following fifty years.

The critical period between 1945 and 1954 remains still a dark period of European history. Only the Nuremberg Trials[29] dealt with the Nazi looting of the legal basis of art. 56 of the Haager Landkriegsordnung.[30] Many cases of dislocation of works of art immediately after 1945 resulted in problems that can be solved only by international law. The problems of restitution of cultural goods dislocated during or immediately after World War II are still underestimated with regard to potential conflicts in certain regions. Recent armed conflicts (e.g., the Gulf War in 1991 and the Afghan conflict) show how cultural goods can become the primary targets of attacks and destruction even in modern times. Particularly during the past decade, the practice of destroying or looting cultural goods in armed conflicts has become so widespread that the question of the reasons for this phenomenon has to be asked more openly.

There are agreements concerning cultural goods, but the contractual obligations are not performed by the same states. Central and Eastern European states who want to join the Western European organizations should acknowledge the Western standards in matters of cultural property. A peaceful and constructive collaboration with these new member states requires a satisfying settlement of open disputes concerning the dislocation of cultural property. The author mentions that we cannot permit a failure in solving these disputes. Such a failure would not only represent a major obstacle in the rapprochement between the European East and West but also pose a threat to the achievements of international law as a whole.

NOTES

1. Reichsgericht of 22 February 1929, 124 *Entscheidungen des Reichsgerichts in Zivilsachen* 115 (1929).

2. Jeanneret v. Vichey, 541 F. Supp. 80 (S.D.N.Y. 1982), *reversed and remanded*, 693 F.2d 259 (2d Cir. 1982).

3. *See, e.g.*, Erik Jayme, Die Nationalität des Kunstwerks als Rechtsfrage, *in Internationaler Kulturgüterschutz, Symposion of Vienna 18–19 October 1990*, 7–29 (Gerte Reichelt ed., Manz 1992).

4. Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objets Unlawfully Removed from the Territory of a Member State, *Official Journal EC,* March 27, 1993, No. L 74, p. 74, reprinted in 6 *Int'l J. of Cultural Property* 387 (1997); *La libre circulation des collections d'objets d'art / The free circulation of art collections,* 223–228 (Quentin Byrne-Sutton and Marc-André Renold eds., Schulthess Polygraphischer Verlag, Zürich 1993).

5. Council Directive 93/7/EEC, *supra* note 4, art. 9 para. 1.

6. The Berlin Declaration of 1988, *Akten des XIII Internationalen Kongresses für klassische Archäologie* 642 (Deutsches Archäologisches Institut ed., Berlin 1988, Mainz 1990).

7. International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 *International Legal Materials* 1322 (1995), *reprinted in* 5 *Int'l J. of Cultural Property* 155–65 (1996); *Art Newspaper,* September 1995, 28.

8. UNIDROIT Convention, *supra* note 7, art. 4 para. 1 (stolen object), art. 6 para. 1 (object illegally exported).

9. Status Report of the Unidroit as of 17 May 1999, http://www.unidroit.org/english/implement/i-95.htm.

10. Among the EC member states, the resale right is not known in the legislations of Austria, Ireland, the Netherlands, and the United Kingdom.

11. Proposal for a Council Directive of 25 April 1996 on the droit de suite of the Author of an Original Work of Art, *Official Journal EC,* June 21, 1996, No. C 178, p. 1; see now the new proposal for a Council Directive, *Official Journal EC,* April 23, 1998, No. C 125, p. 8. This proposal for a council directive was rejected on June 21, 1999. On March 15, 2000 a compromise was finally found concerning the artist's resale royalty (*droit de suite*) in the European Union. However, approval by the EU's Council of Ministers and the European Parliment is still required.

12. Loi of 20 Mai 1920, Frappant d'un droit, au profit des artistes, les ventes publiques d'objets d'arts, *Dalloz, Le Bulletin législatif,* 1920, 236, completed by décret of 17 December 1920, Relatif à l'application de la loi du 20 mai 1920, frappant d'un droit de 2%, au profit des artistes, les ventes publiques d'objets d'arts, *Dalloz, Le Bulletin législatif,* 1920, 694.

13. Berne Convention for the Protection of Works of Literature and the Arts of 26 June 1948 (revisions of 1967/71, Stockholm/Paris), 489 U.N.T.S. 392.

14. *See, e.g.,* Belgium; this restriction was abolished in France in 1957.

15. *See* the legislation in Portugal and Italy.

16. Court of Justice of the European Communities of 20 October 1993, Phil Collins v. Imtrat Handelsgesellschaft mbH (No. C 92, p. 92) and Patricia Im- und Export Verwaltungsgesellschaft mbH und Leif Emanuel Kraul v. EMI Electrola GmbH (No. C 326, p. 92), [1993] *European Court Reports* I, 5171, *reprinted in* 1994 *Gewerblicher Rechtsschutz und Urheberrechti, Zeitschrift der Deutschen Vereinigung für gewerblichen Rechtsschutz und Urheberrecht, Internationaler Teil* (*GRUR Int.*) 53.

17. Treaty of 25 March 1957 Establishing the European Community, 298 U.N.T.S. 3.

18. *Supra* note 13.

19. *Supra* note 11.

20. *E.g.,* the percentages should be elevated to 6 percent, 5 percent and 4 percent and the minimum price reduced to 500 ECU. Furthermore, the export of works for the purpose of their resale in countries lacking correspondent provisions should be included.

21. Bundesgerichtshof of 16 June 1994, 126 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 252 (1995).

22. German copyright Act of 9 September 1965, 1965 *Bundesgesetzblatt* I, 1273, in the current version of 16 July 1998, 1998 *Bundesgesetzblatt* I, 1827.

23. English copyright law recognizes neither the *droit de suite* (Resale Royalty Right, Proceeds Right) nor a comparable legal principle.

24. Landgericht Düsseldorf of 31 October 1990—12 O 196/90, 1991 *Neue Juristische Wochenschrift-Rechtsprechungs-Report Zivilrecht* (NJW-RR) 1193.

25. Oberlandesgericht Düsseldorf of 21 January 1992, 20 U 165/92, 1992 *Gewerblicher Rechtsschutz und Urheberrecht, Zeitschrift der Deutschen Vereinigung für gewerblichen Rechtsschutz und Urheberrecht (GRUR)* 436.

26. *Supra* note 21.

27. *Supra* note 13.

28. Agreement between Germany and Russia of 15 February 1993, 1993 *Bundesgesetzblatt* II, 1736.

29. The trial against the main war criminals took place at the Military Court in Nuremberg between November 14, 1945, and October 1, 1946.

30. Hague Convention of 18 October 1907 Concerning the Laws and Customs of War on Land, 205 C.T.S. 345. Art. 56 reads: "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."